Ford Motor Company

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VIA FEDERAL EXPRESS

Mr. Donald S. Clark, Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Ave., NW
Washington, DC 20580

Ms. Constance K. Robinson
Director of Operations and Merger Enforcement
Antitrust Division, Department of Justice
Room 10103
601 D Street, NW
Washington, DC 20530

Dear Ms. Robinson and Mr. Clark:

I am writing on behalf of Ford Motor Company to provide Ford's comments on the notices of interim rules and proposed rulemaking published in the Federal Register on January 25 regarding changes to the premerger notification rules and form. I am the Ford attorney responsible for preparing premerger reports on transactions proposed by Ford or those entities it controls.

Ford opposes the creation of two new filing thresholds in the interim rules and suggests that those changes be eliminated. Ford also opposes the limitation of the five year timeframe of Rule 802.21 in the interim rules, and suggests that the Commission provide that those filing prior to the HSR Act amendments have the full five year period originally available to make additional acquisitions without filing. Ford believes that the proposed changes to the rules exempting acquisitions of foreign assets and securities of foreign issuers are too restrictive and burdensome.

party submitting a filing to have a dispute with the FTC over the proper amount of the filing fee; it is very different to have a dispute over whether a filing was required, with a potential penalty of $11,000 a day.

Ford urges that the Commission eliminate the two new dollar amount filing thresholds, while retaining the two filing thresholds of 25% and 50% of voting securities held as a result of the acquisition. These thresholds, in addition to the $50 million size of the transaction test, will provide notice to the agencies of voting security acquisitions that may raise competitive concerns. Retaining these existing thresholds would also avoid imposing additional uncertainty into the determination whether a filing is required. Acquisitions of assets should continue to be subject only to the size of the transaction threshold.

Transitional rule on the five year timeframe for additional acquisitions

Ford opposes the shortening of the five year period in which additional acquisitions of voting securities may be made without a filing. This limitation will increase the costs and burdens of numerous persons acquiring additional voting securities following transactions that have already been reviewed by the agencies.

Rule 802.21 permits an acquiring person to make additional acquisitions of voting securities without another HSR filing for a period of five years after the waiting period has expired, provided that a higher notification threshold is not met or crossed. The interim rules establish a "transitional rule" limiting this period to February 1, 2002, in order to eliminate a burden imposed by "administering two sets of notification thresholds." It is difficult to understand the burden imposed by continuing an exemption from filing based on well-understood thresholds. Ford submits that any burden imposed on the Premerger Notification Office is vastly outweighed by the burden imposed on parties required to prepare filings and pay additional filing fees, and the burden imposed on the agencies required to review these additional filings previously deemed unnecessary.

Ford urges the Commission to change the transitional rule to provide that previous filers have the full five year period originally available at the time of their filing to make additional acquisitions of voting securities, provided that the next higher threshold in effect at the time they filed is not met or exceeded.

Proposed rules governing exemption of acquisitions of foreign assets and voting securities of a foreign issuer

The proposed rules include a substantial revision of Rules 802.50 and 802.51 governing exemptions of acquisitions of foreign assets and voting securities of a foreign issuer. Ford opposes the elements of the revisions likely to reduce the scope of the exemptions, thus imposing the burden and costs of additional filings. It is quite clear that the scope of these exemptions should be increased, not reduced.

The Final Report of the International Competition Policy Advisory Committee to the U.S. Attorney General and Assistant Attorney General for Antitrust recognized that the Rules

require an excessive number of filings on foreign transactions. After reviewing statistics showing that five enforcement actions were taken in the 849 transactions reviewed in fiscal year 1999, the Committee stated at page 125 of their report:

> These statistics suggest not only that very few foreign transactions pose the potential for anticompetitive effects significant enough to warrant the intervention of the U.S. antitrust agencies, but also that many more transactions than may be necessary come within the U.S. merger review net.

While declining to make specific recommendations on exemption amounts, the Committee recommended that the FTC consider the effect of inflation on the exemption amounts at page 126 of their report:

> *Given that these levels* [exemption amounts] *have not been adjusted for many years,* however, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons and that the U.S. antitrust agencies give serious consideration to the threshold exemptions to ensure that transactions that are not likely to violate the antitrust laws are exempt from premerger reporting classes of transactions. (Emphasis added.)

Ford submits that the proposed rules do not adequately reflect the effects of inflation since the Rules were first promulgated. For exemptions based on assets held in the United States, previously $15 million, the proposed rules properly follow the action of Congress in increasing that amount to $50 million. For exemptions based on sales in or into the United States, previously $25 million, the proposed rules do not increase that amount by a corresponding factor, which would be to about $85 million, but again uses $50 million. Ford recommends that the exemptions based on sales in or into the United States be increased to $85 million. Additional concerns about the substantive changes proposed follow.

Proposed Rule 802.50 exempts the acquisition of foreign assets except assets generating sales into the United States of more than $50 million during a period of the most recently completed fiscal year and the current year up to at least 60 days prior to the filing. The requirement of combining sales in the year of the filing with sales in the prior fiscal year will substantially narrow the exemption, thus imposing the burden and cost of filings, and produces arbitrary results depending on the time of year the filing is submitted.

The rationale for the proposed change is to require filings on those acquisitions of assets responsible for sharply increasing sales into the United States. However, an acquisition involving sales at a steady rate of $2.5 million per month is exempt if made in April but not if made in December. Ford recommends this change not be implemented; if such a change is deemed necessary, sales should not be aggregated but the sales in the larger of the two periods be used to determine if the exemption applies.

Proposed Rule 802.51 would change the basis for determining the value of assets the foreign issuer holds in the Unites States from the existing book value to current value. This imposes an additional burden on the parties to extract the specific U.S. assets and determine their fair market value, a defined term in the Rules and subject to dispute by the agencies, thus subjecting the parties to possible penalties. Ford recommends that book

value continue to be used because it is a simple, readily available value and provides certainty to parties seeking to determine whether the exemption is available.

Proposed Rule 802.51 also requires combining sales in the year of filing with sales in the prior fiscal year. Ford opposes this change for the same reasons as discussed in connection with Rule 802.50.

Changes to the Premerger Report Form

One change proposed in the premerger report form would require parties to provide a detailed description of the valuation method used to determine the appropriate filing fee in certain instances, and to always identify the person performing the valuation. These requirements add additional burden to the parties, and if the agencies have questions about the valuation method, they can always raise them with the reporting person. There should be no need to name the person performing the valuation; an officer of the filing party certifies the accuracy of the information in the filing. Ford recommends these changes be eliminated.

Another section of the form requires a voluntary listing of any foreign antitrust authority that will be notified of the proposed transaction. Ford opposes this change due to the burden it imposes. The determination of the countries requiring a premerger report is a substantial burden frequently completed after HSR filings are made. Moreover, the listing is unnecessary in the great majority of filings, which are not closely reviewed or are granted early termination.

Ford appreciates the willingness of the Commissioners and its staff, and the staff of the Antitrust Division, to consider Ford's concerns regarding changes to the premerger rules and report form. If any questions arise or if there is a desire to discuss this submission, please do not hesitate to contact me.

Respectfully submitted,

Stephen Bolerjack

Stephen D. Bolerjack
Counsel – Antitrust

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